

office of Chief Counsel  
Internal Revenue Service

## memorandum

CC:SB:5:DEN:2:GL-151601-01  
JAWeeda

date: OCT 22 2001

to: Territory Manager, SB/SE (Compliance)  
Territory 3, Denver 1, Area 11  
MS 5000DEN

from: Area Counsel  
(Small Business/Self-Employed:Area 5)

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subject: Certified Mailing of Collection Due Process Notices

The following is in response to your request for our views on the proper procedure to be followed in making service of a Collection Due Process ("CDP") Notice, L-1058, by certified mail, return receipt requested, so that the Service has proof that such service has been made or attempted for the purpose of marking off the 30 day period during which a taxpayer may request a CDP hearing.

### ISSUES

You have asked the following two questions:

1. Is it sufficient to prepare the L-1058, attach the return receipt and put it in the "outmail" box of the IRS collection group, document the case history of the mailing and presume it is mailed timely? Mail is picked up once a day.

2. Or is it necessary that this L-1058 be hand carried to the local Post Office so that the Certified Mail Receipt may be "ball date stamped" as proof that the letter was in fact mailed on a given date.

The explicit concern expressed in your request was with the fact of mailing "on a given date." Your request did not explicitly tie in your questions to any concern for calculating the end-point of the 30 day period during which the taxpayer named in the L-1058 has to request a CDP hearing. But we gather that calculating the end-point or deadline for filing a CDP request was your implicit but real concern because proving the "given date" is only important for that purpose. The fact of mailing itself is established by the certified mail return receipt the statute requires. When the receipt is returned with

the date of delivery shown on the entire envelope returned indicating that delivery was attempted but went unclaimed, the fact of mailing is established, assuming, as we do for purposes of this discussion, that the letter was addressed to the last known address.

Treating the end of the 30 day period as the real focus of your request for advice, we have restated the issues as follows:

1. Whether the date for marking off the 30 day period is the date of the CDP Notice, L-1058, (alternately, "L-1058" or "CDP Notice") or the date of mailing of the CDP Notice.

2. Whether the date for marking off the 30 day period is the date of mailing or the postmark date on the envelope carrying the CDP Notice.

3. Whether testimony by a Service employee concerning the date that the CDP Notice is placed in a mail box and introduction into evidence of the PS Form 3800, Certified Mail Receipt, with that employee's notation of the date it was placed into the mail box is more compelling than that same employee testifying that he or she delivered the CDP Notice to a local post office and introduction of the PS Form 3800 with an actual postmark.

4. Whether the actual and likely frequency that an issue regarding the date of the CDP Notice might arise warrants requiring a trip to the post office to obtain a postmark for every CDP Notice sent by certified mail.

5. Whether the Service has the discretion to accept as timely a CDP request which is delivered by mail with a postmark later than 30 days after the date of the CDP Notice upon presentation of acceptable evidence that either the actual mailing of the letter was later than the date on the CDP Notice or that their request was actually placed in a mail box on the date it was due.

6. Whether the timeliness of a CDP request in relation to the date a CDP Notice is placed in the mail is a jurisdictional issue.

#### CONCLUSIONS

1. It is the date of mailing that is determinative. Any procedure used by the Service should insure that the date of mailing is the same date placed on the CDP letter so that the instruction in the letter that any request for a CDP hearing must be filed within 30 days after that date conforms to what the

statute requires.

2. Again, it is the date of mailing that is determinative. The postmark date is merely evidence of the date of mailing. In point of fact, a letter may not be postmarked for several days after placing a letter in a mailbox.

3. Qualitatively, the testimony with an actual postmark would be more compelling in establishing the mailing date but the difference is not huge.

4. We are not aware of any cases involving the timeliness of a request for a CDP hearing based on a determination of when a CDP Notice was issued. By analogy, cases involving the timeliness of a petition to the United States Tax Court have only infrequently focused on the date the statutory notice of deficiency was mailed, rather they have focused on whether a taxpayer timely mailed a petition within the 90 day period following the date on the statutory notice of deficiency. Any cost benefit analysis on this score must be an administrative call.

5. The Service has such discretion but it cannot waive the time restrictions in the statute. At this point, we do not attempt to provide definitive guidance on the application of that discretion. These cases should be handled on a case by case basis.

6. Establishing whether or not a party is entitled to a full-fledged CDP hearing and the "ticket to court" which comes with the issuance of a Notice of Determination following such a CDP hearing is a jurisdictional issue.

Given the answers above, we would respond to your two questions as follows:

1. It is not sufficient to place the CDP Notice in a group mail box and presume anything unless the procedures in place guarantee that the CDP notice will be placed in a postal service mail box the same date as shown on the CDP Notice.

2. It is not necessary to take the certified mail receipt to the post office to satisfy the statutory requirement but it would help to establish the mailing date and avoid problems of proof which could arise later.

We recommend that each collection group maintain a Form 3877 book to log in all CDP notices which then must be carried to the post office for signature and a postmark date. That date would

be considered the date of mailing and must match the date on the CDP Notice.

### BACKGROUND

Your request for advice comes out of a concern with a procedure whereby revenue officers complete all the necessary forms to send the CDP Notice, L-1058, by certified mail, including PS Form 3811, Domestic Return Receipt, affix them to the envelope along with sufficient postage to pay for all services and then drop the envelopes in a group mail box whose contents are supposed to be mailed on the same day shown on the CDP Notice and the PS Form 3800, Certified Mail Receipt (referred to interchangeably below as "PS Form 3800" or "Certified Mail Receipt"). Your concern apparently comes from the lack of control or uncertainty over whether the mail actually gets placed into a mail box or receptacle on a particular day as opposed to the control or certainty that would come from actually bringing the CDP Notice to the post office and having the Form PS 3800 stamped with a postmark bearing that date.

We understand that the Automated Collection Systems ("ACS"), maintains a PS Form 3877 book, Firm Mailing Book for Accountable Mail (like that maintained by the Service Centers, Appeals and Examination for logging the certified mailing of statutory notices of deficiency and CDP Notices of Determination) for the purpose of logging in the CDP Notices (known as LT-11s at the Service Center or ACS cites instead of L-1058s). We also understand that the lien filing unit in Compliance Technical Support in Denver maintains a PS Form 3877 for the purpose of logging in the CDP Notices issued under I.R.C. § 6320. Each day the CDP notices are mailed, an employee takes the PS 3877 to the post office. A postal employee signs the page(s) of the form showing the recipients of the CDP Notices and their addresses and attests to the certified mailing of each CDP notice that day. A Certified Mail Receipt is also separately stamped with a postmark for each CDP notice mailed to a taxpayer/recipient.

The field does not apparently use PS Form 3877.

### DISCUSSION

#### 1. Issues 1 through 4.

I.R.C. § 6330(a)(2) requires that a CDP Notice be "given in person, left at the dwelling place or usual place of business, or sent by certified or registered mail, **return receipt requested**, to such person's last known address (emphasis supplied) no less

than 30 days before the day of the first levy."<sup>1</sup> The temporary regulations under section 6330 repeat this requirement at Treas. Reg. § 301.6330-1T (a)(3), Q&A-A8. According to Q&A-A9 of the temporary regulations, notification properly mailed or left at the taxpayer's last known address, is sufficient to start the 30-day period in which the taxpayer must request a CDP hearing. If the Service discovers that it did not properly serve the CDP Notice and the taxpayer does not receive it, it must serve a substitute notice and give the taxpayer 30 days from the date of that notice to request a hearing. See Q&A-A10. Although not specified in the regulations, improper service could include not using the last known address or not mailing the notice by certified mail, return receipt requested.

Neither the statute nor the regulations specify how the certified mail forms should be completed or the envelope delivered, except to require that the Service request a return receipt. As the result of a TIGTA audit, we understand that the Internal Revenue Manual ("IRM") will be amended in the meantime to provide detailed guidance to revenue officers for the mailing of CDP notices by certified mail; detailed guidance which was not in the IRM before. It has been long accepted practice for patrons of certified mail to complete all the forms needed, affix the proper forms to the envelope, including the domestic return receipt, and mark the date the mail is placed in a postal service mail box or receptacle on the retained Certified Mail Receipt without requiring a visit to the post office to obtain a postmark date to prove that the letter was mailed on that day. See instructions on the back of Form 3800 which differentiate between circumstances in which a postmark is "desired" and those where it is not "needed."

A postmark date has nothing to do with the validity of a CDP Notice, L-1058, per se; there is no deadline date to meet which would be marked by the postmark such as would be the case in the issuance of a statutory notice of deficiency in relation to the statutory limitations period to assess. But such a postmark date is important for marking off the 30 day period during which a taxpayer has a right to request a CDP hearing under the statute if that postmark date is also the date that the CDP Notice is actually mailed. See I.R.C. § 6330(a)(3)(B).

The CDP Notice, L-1058, instructs the taxpayer to make a request for a CDP hearing within 30 days of the date on the letter. It is the Service's practice to synchronize the date on

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<sup>1</sup> We assume throughout that there is no question that the CDP Notice was mailed to the last known address.

the CDP letter with the date of mailing. Service by mail by the Internal Revenue Service is made on the day that a letter or notice is mailed, that is, placed into a mail box, not on the date of the postmark. "Proper timely mailing of a document raises a rebuttable presumption that the document has been timely received by the addressee." Lewis v. United States, 144 F.3d 1220, 1222 (9<sup>th</sup> Cir. 1998).<sup>2</sup> In most cases, the day that a document is placed in a mail box is the day that it is postmarked, at least if it is placed before a pick up time that day. But the date of mailing, not the date of the postmark, is the determinative date just as it is in the case of statutory notices of deficiency. "It is well settled that the date appearing on the deficiency notice is not proof of the date of its mailing or that the 90-day period for filing a petition with this Court runs from such date." August v. Commissioner, 54 T.C. 1535, 1536 (1970).

In terms of complying with the demands of the statute and regulations for mailing the CDP Notice by certified mail, as long as the group mail is actually mailed on the date of the letter and the date noted on the PS Form 3800 for the purpose of counting off the 30 day period accurately, we see no legal difference between simply placing the envelope with the properly completed return receipt requested and certified mail receipt sticker, etc. directly into a mail box and noting that date on the PS Form 3800 by hand or walking the envelope to the post office to get an official postmark on the PS Form 3800 showing the date.

However, all things being equal, the use of an actual postmark would carry more weight in establishing or proving the date of mailing in a court of law on this issue. In either case, a Service employee might still need to testify when he or she dropped the envelope in the postal mail box or that he or she took the PS Form 3800 to the post office to get an actual postmark and to introduce the PS Form 3800, Certified Mail Receipt, into evidence. An actual postmark on the PS Form 3800, however, would make it easier for Counsel attorneys to establish the proper mailing by motion on a particular date, if appropriate in a given case, without the need for actual testimony.

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<sup>2</sup> The Service takes the position that the rule is different for parties mailing items to the Internal Revenue Service for purposes of establishing timely filing, payment or delivery. See I.R.C. § 7502 and its emphasis on a postmark date. As shown later, not all courts agree with the view that section 7502 controls items mailed to the Service.

We have confirmed with the United States Postal Service that the only way that a sending party can obtain the postmark date for a certified letter (which would also be the same day that the letter is actually mailed) is to bring the Certified Mail Receipt or PS Form 3877 to a post office. There is no postal form or system of records which could be used to independently verify the actual date of mailing after the fact. The date the certified mail entered the postal system will be listed on the Postal Service website ([www.usps.gov](http://www.usps.gov)) for one year, accessed by using the number on the PS Form 3800. But that date will generally be later than the date of actual mailing, that is, the placing of the letter in a postal mail box. The records kept of attempts to deliver a certified letter do not record the date of the postmark let alone the day that a letter is actually placed in a mail box.

While it may be incrementally more compelling to be able to present a certified mail receipt with a post office postmark rather than a handwritten notation at any trial, we cannot comment on whether the additional cost involved in such a procedure across the board is warranted by the occasional situation in which it might prove useful. We are aware of no such cases to date in the CDP area. We are aware that there are numerous instances in which a taxpayer has contested the timeliness of their petition to the Tax Court from a statutory notice of deficiency. But the focus in those cases has not been on establishing the date of mailing of the statutory notice of deficiency as much as they are focused on contesting the very issuance of a statutory notice of deficiency, issuance to the last known address, or, given the date of mailing, whether the petitioner timely mailed his petition. There are also cases which involve the question of whether the Service ever issued a timely statutory notice of deficiency where the Service has lost the examination file and/or cannot produce the PS Form 3877 log or comparable information. In those cases, the government is often hard put to establish the timely issuance of a statutory notice of deficiency based on little more than the presumption of governmental regularity. See, for example, Pietanza v. Commissioner, 92 T.C. 729 (1990), aff'd without published opinion, 935 F.2d 1282 (3<sup>rd</sup> Cir. 1991). Otherwise, production of the PS Form 3877 in the absence of contrary evidence has usually won the day. United States v. Zolla, 724 F.2d 808 (9<sup>th</sup> Cir. 1984).

Nonetheless, it strikes us that the keeping of a PS Form 3877 in each field collection group is the best way to avoid any issues arising in the future about the timeliness of a request for CDP hearing based on a dispute about the date the CDP Notice was mailed.

### Issue 5. Discretion.

It is our view that the Service does have the discretion to treat a CDP request as timely if the taxpayer comes forward with some evidence that the date on the CDP Notice was not the date it was mailed such as the CDP envelope marked with a later postmark. The Service could as well decide that the taxpayer timely mailed a CDP request on the grounds that the taxpayer presented credible testimony that he had placed the CDP request into a mail box timely, especially in the Ninth Circuit. Lewis v. United States, 144 F.3d 1220 (9<sup>th</sup> Cir. 1998) (adopted the mail box rule rather than treating section 7502 as the exclusive means of establishing timeliness in awarding attorneys fees to the taxpayer based on his credible testimony and other corroborating evidence that he had dropped his return in the mail before the date of the postmark). This is to be distinguished from waiving the time restrictions of section 6330. The Tax Court in Kennedy v. Commissioner, 116 T.C. 255 (2001) noted that section 6330 does not authorize the Service to waive such time limits.

### Issue 6. Jurisdiction.

The question of the Tax Court's or District Court's jurisdiction in CDP cases is based on the timely appeal to the proper court from the proper issuance of a Notice of Determination. I.R.C. § 6330(d)(1); Meyer v. Commissioner, 115 T.C. 417, 421 (2000) and cases cited therein. If the Tax Court can decide that it does not have jurisdiction because it determines that the Notice of Determination was invalid on the grounds that there was no proper CDP hearing it can certainly decide whether it has jurisdiction over a case where a CDP hearing should have been held because the CDP request, which should have led to a Notice of Determination, was timely.

The Tax Court has considered such jurisdictional issues when the taxpayer appealed from a Decision Letter issued by Appeals after granting an equivalent hearing to taxpayers who had indisputably failed to file a timely CDP hearing request. Kennedy v. Commissioner, 116 T.C. No. 19 (2001); Moorhous v. Commissioner, 116 T.C. No. 20 (2001).

### SUMMARY

To summarize, the use of certified mail with a return receipt requested form is mandated by the statute in mailing CDP notices before taking any levy action. The payment of proper postage is implicit in that requirement. For purposes of establishing the beginning point of the 30 day period for a taxpayer to request a CDP hearing, a PS Form 3877 log is the best



insurance against any problems arising in the future, even though the statutory requirements could be satisfied by other procedures which insure that the date on the CDP letter was the date the CDP Notice was mailed, that is, dropped into a postal service mail box. Whether such a procedure should be instituted as a general practice calls for an administrative decision based in part on the likelihood such issues might arise in CDP proceedings as a whole and the costs involved.

This memorandum has been reviewed and approved by Branch 1, Collection, Bankruptcy, and Summons, of the Office of Chief Counsel.

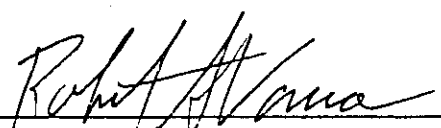
Questions with regard to the above should be referred to the undersigned at 303-844-2214, ext. 248.

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